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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. ALFRED A. AUGER, Defendant and Appellant.	C043453 (Super.Ct.No. 01F603)

In an apparent act of road rage, defendant Alfred A. Auger hit a pedestrian with his car, and a jury convicted him of assault with a deadly weapon by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).) The trial court suspended imposition of sentence and placed defendant on probation for three years.

On appeal, defendant contends (1) evidence was improperly admitted, (2) the evidence is insufficient to support the jury's verdict, (3) the prosecutor engaged in misconduct, (4) the court

erred in instructing the jury, (5) his attorney did not provide effective assistance of counsel, and (6) the cumulative effect of these errors compels reversal. None of these claims has merit, and we therefore affirm the judgment.

FACTS AND PROCEEDINGS

Defendant is a former race car driver and racing instructor. He is a free lance journalist who writes reviews of automobiles for magazines and newspapers. At the time of this incident, defendant had been test-driving a Saab convertible with manual transmission for several days.

On the morning of December 30, 2000, defendant drove the Saab, with the top down, into a Costco parking lot. The lot was very busy and parking was at a premium. One observer described the lot as "mayhem." As defendant drove down one aisle looking for a space, he had to back up for a truck that was trying to fit into a parking space. A number of people were walking in the lot. One of them, Andrew Glover, was walking in the middle of the parking aisle, which apparently prevented defendant from getting past. When Glover finally moved over to the side, defendant drove up next to him and angrily asked, "Do you always walk in the middle of the street?" Defendant drove on, but was stopped at the end of the aisle by another car that was attempting to turn into the same lane. While these cars were at a standstill, Glover walked between the cars to get a shopping cart at the front of the store.

Defendant revved his engine, turned the wheels to the right, and drove directly into Glover, hitting him. Glover did a cartwheel over the carts and landed on the ground, unconscious. Defendant stopped when he hit a shopping cart that became embedded in the hood of his car.

Charlene Meek had been getting a cart next to Glover and saw the entire incident unfold. She said defendant clutched the wheel firmly, had "a very angry look on his face," accelerated, turned the wheel toward Glover, and deliberately drove into him. She was extremely upset and immediately went up to defendant's car and screamed, "Why did you do that? Why did you hit this man?" Defendant did not reply and simply sat in his car.

A Costco employee, William Hazelheur, also saw the incident and described defendant as having an "enraged" look on his face.

Defendant eventually got out of his car to take pictures of the damage to his car.

Glover was hospitalized for six or seven days following the incident.

Defendant was charged with assault with a deadly weapon by means of force likely to cause great bodily injury.

The critical issue at trial was whether defendant intentionally hit Glover or whether the collision was an accident. Defendant gave a variety of explanations for the incident. Fifteen minutes after the collision, he told Meek that his brakes had failed, but he also told her that the accelerator stuck. He told an investigator that Glover had

shoved two shopping carts at him, but at trial he said he "misspoke" when he made this statement. He said that he accidentally hit the accelerator instead of the brake while trying to avoid a shopping cart. He said he tried to avoid the carts, but the physical evidence established that the wheels of the car were turned toward the right, in the direction of the carts and away from the roadway.

Meek and Hazelheur described the incident they had witnessed and said that defendant appeared angry and deliberately drove into Glover. There were no loose carts near defendant.

Hazelheur also testified that shortly before a court date in November 2001, defendant approached him at the store and threatened him by stating, "You will learn to keep your mouth shut, you son of a bitch, if you know what is good for you."

An investigator examined defendant's car and found no mechanical problems. The car turned to the right only if steered in that direction. The pedals on the car were like those of other European cars, and were not significantly different in layout or dimensions from other cars with manual transmissions. The investigator opined that defendant's explanation of the mechanics of the incident did not make sense.

A defense expert criticized the on-the-scene investigation, and testified that there was insufficient evidence to determine how the collision took place.

The jury convicted defendant as charged and the trial court placed him on probation for three years. This appeal followed.

DISCUSSION

I

Evidence of Defendant's Appearance and State of Mind

Defendant contends the court erred in permitting witnesses to offer their opinions that defendant had a "look of rage" and acted intentionally. There was no error.

Initially, we note that defendant did not raise this specific objection in the trial court and therefore has not preserved this issue for appeal. (*People v. Farnam* (2002) 28 Cal.4th 107, 153.) However, because defendant also cites this lapse as an example of ineffective assistance of counsel, we address the claim on its merits.

Witness Charlene Meek described defendant as having his hands gripped on the steering wheel, and an angry look on his face. Defendant turned the wheels of his car toward Glover and gunned the engine. She said there was no question in her mind that defendant intentionally hit Glover.

Similarly, Hazelheur testified that defendant appeared "enraged." Defendant accelerated toward the victim. He too was certain that defendant intentionally hit Glover.

Defendant characterizes this testimony as improper lay opinion. He is wrong.

Evidence Code section 800 provides: "If a witness is not testifying as an expert, his testimony in the form of an opinion

is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony." Evidence Code section 805 provides: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact."

Here, the witnesses' description of defendant as looking angry or enraged was based on their personal observations. The witnesses did not testify that defendant was in fact angry, but simply that he *appeared* angry. A description of expressions is within the range of common experience and served to clarify the witnesses' testimony. For example, in *Farnam*, a witness appropriately described the defendant as standing "in a posture like he was going to start fighting." (*People v. Farnam, supra,* 28 Cal.4th at p. 153.) The same is true here. The witnesses described defendant in terms that helped clarify their observations. They explained what defendant looked like and the deliberateness of his actions. The trial court did not exceed its discretion in permitting this testimony.

Defendant also asserts the court erred in permitting Officers Panza and Hughes to testify about defendant's credibility and state of mind. In his opening brief, defendant does not cite any specific testimony of Officer Panza that he finds objectionable. Arguments and claims of error raised for the first time in the reply brief are deemed waived (*Garcia v.*

McCutchen (1997) 16 Cal.4th 469, 482, fn. 10; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8). We therefore limit our discussion to the testimony of Officer Hughes, the investigating officer.

Hughes had worked as a Redding police officer for 29 years, and also had a private business doing accident reconstruction for insurance companies. He inspected and tested the Saab, and found no problem with its brakes or steering. The car did not pull to the right. It was similar to other cars with manual transmissions. The clutch had to be released in order for the car to move forward.

Hughes described his interview with defendant, in which defendant stated that when he tried to avoid a shopping cart that was rolling in his path, he meant to hit the brakes to stop the car and instead hit the accelerator. Defendant said he was very unfamiliar with the car because he had taken possession of it only two hours earlier. However, at trial, defendant said he again "misspoke" when he said this to Hughes, and in fact he had driven the car for several days.

Hughes opined that defendant's explanation of events did not make sense. The car had front wheel drive and did not pull to the right when it braked. Given defendant's experience with cars, Hughes did not believe that defendant was unfamiliar with operating a manual transmission.

This testimony was proper. Hughes, an accident investigator, testified as an expert witness. (See Evid. Code,

§ 801.) He described the car, its operation, the mechanics behind the collision, and his conversations with witnesses. His conclusion that defendant's explanation was not credible was within the scope of his expertise. There was no error in admitting this opinion evidence. (See *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1227-1228; *Neumann v. Bishop* (1976) 59 Cal.App.3d 451, 460.)

II

Evidence of Defendant's Threat to a Witness

Over defendant's objections, Hazelheur testified at trial that defendant approached him at Costco in November 2001, shortly before a court hearing, and said, "You will learn to keep your mouth shut, you son of a bitch, if you know what is good for you."

Defendant contends this testimony should have been excluded under Evidence Code section 352 because it "was not probative on any issue in this case. It was simply prejudicial, because it improperly bolstered Hazelheur's questionable credibility." We disagree.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised

its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Noting that Hazelheur did not testify that he was frightened by defendant's threat, defendant contends the threat was not probative on any issue. Defendant misperceives the reason this evidence was offered. A defendant's threat to a witness demonstrates consciousness of guilt (*People v. Warren* (1988) 45 Cal.3d 471, 481), and the jury was instructed accordingly pursuant to CALJIC No. 2.04 which, as given to the jury, provided: "If you find that the defendant attempted to dissuade a witness from testifying at trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide." Defendant's threat to Hazelheur was relevant on this point, and the trial court acted well within its discretion in concluding that its probative value outweighed any potentially prejudicial effect.

Defendant also faults the trial court for permitting Hazelheur to testify that he obtained a restraining order against defendant. In fact, the court precluded questioning on this point. Hazelheur briefly alluded to the restraining order in responding to another question, but the witness or any of the attorneys did not mention the matter again. To forestall any claim that counsel was ineffective in failing to object to this

unsolicited testimony, we note that the decision not to object was a matter of trial tactics. Defense counsel may well have concluded that an objection would only draw attention to Hazelheur's fleeting remark. (See *People v. Padilla* (1995) 11 Cal.4th 891, 958, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) There was no ineffective assistance of counsel.

III

Sufficiency of the Evidence

Defendant contends the evidence presented at trial did not support the jury's verdict. Again, we disagree.

Throughout his brief, defendant presents "facts" and draws inferences in a light most favorable to his position. But that is not the proper standard on appeal. Instead, the test "for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is

supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294,314.)

Defendant asserts that there was no evidence that he intended to injure Glover. That claim is predicated on defendant's insistence on skewing evidence and inferences in his favor. When the proper standard is applied, it is readily apparent that abundant evidence supports the jury's verdicts.

Two independent eyewitnesses described defendant angrily and intentionally hitting Glover. The physical evidence was consistent with their description. There was nothing mechanically wrong with defendant's car and the wheels could have pointed to the right, toward the victim and the carts, only if defendant steered in that direction. Defendant was an expert driver and his claim that he accidentally pressed the wrong pedal was simply not credible. Defendant offered inconsistent explanations about the accident and threatened a witness. He offered no reply when an eyewitness hysterically asked him why he had hit the victim.

Defendant's claim that the jury's verdict lacked evidentiary support is utterly without merit.

IV

Prosecutorial Misconduct

Defendant contends the prosecutor engaged in misconduct by commenting on the credibility of witnesses.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citations.]

"Regarding the scope of permissible prosecutorial argument, we recently noted '"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. . . .'"'" (*People v. Hill, supra,* 17 Cal.4th at p. 819.)

Defendant failed to object to the comments now characterized as misconduct, nor did he request an admonition or curative instruction. Although defendant makes the conclusory assertion that an objection would have been futile and/or would not have cured any harm, he offers no evidence to support this contention. Consequently, any claim of prosecutorial misconduct must be deemed waived. (*People v. Hill, supra*, 17 Cal.4th at p. 821.)

Again, however, because defendant asserts this claim as part of his ineffective assistance of counsel argument, we address the merits.

Defendant characterizes several comments the prosecutor made in closing argument as misconduct, asserting that the prosecutor "sp[oke] to the jury as a witness," vouched for the witnesses, and presented herself as an expert on matters of credibility. Defendant is incorrect. Nothing the prosecutor did suggested that she was relying on evidence that was not presented at trial. (See *People v. Earp* (1999) 20 Cal.4th 826, 864; *People v. Miranda* (1987) 44 Cal.3d 57, 110.) To the contrary, the prosecutor carefully reviewed witness testimony, emphasizing the strength of prosecution witnesses and the inherent problems with defendant's explanation of events. There was nothing improper in pointing out that defendant offered different versions of events and had a motive to lie, while the testimony of the two eyewitnesses was consistent. The prosecutor's arguments were based exclusively on evidence offered at trial. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 781-782.)

Defendant also faults the prosecutor for commenting to the jury that she did not know why defendant committed this act. He asserts the prosecutor thereby "discussed her own thought processes," and conveyed to the jury that she believed defendant to be guilty "based on her personal knowledge of the evidence at that time, not on the evidence presented at trial, as no such

evidence was presented." Defendant ignores the context of the prosecutor's comment. The prosecutor's remark was made while explaining to the jurors that motive was not an element of the offense and did not have to be established. There was nothing improper about the prosecutor's statement.

There was no misconduct.

V

Instructional Errors

Defendant raises two claims of instructional error, which we address in turn.

A. CALJIC No. 4.45

The trial court instructed the jury pursuant to CALJIC No. 4.45 ("Accident and Misfortune") as follows: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent nor purpose, nor criminal negligence, he does not thereby commit a crime."

Citing *People v. Lara* (1996) 44 Cal.App.4th 102, defendant contends that, because the charged offense was one of general intent, the instruction should have been modified to delete any reference to "criminal negligence." He asserts that the failure to modify the instruction accordingly requires reversal. The People concede the error but assert the error is harmless. The People are correct.

In *Lara*, the defendant was charged with battery, a general intent crime. The court instructed the jury on general criminal

intent, and on accident pursuant to CALJIC No. 4.45, as quoted above, including the reference to "criminal negligence." (*People v. Lara, supra*, 44 Cal.App.4th at p. 106.) The People argued the case on both a general criminal intent theory and on a criminal negligence theory (*id.* at pp. 106-107), and the court instructed that it could convict the defendant if it found general criminal intent *or* if it found that the defendant acted with "criminal negligence," i.e., with reckless conduct but without the intent to commit the act. (*Id.* at pp. 106-108.)

The appellate court concluded that giving CALJIC No. 4.45 was error because an accident defense based on criminal negligence is not available in cases charging general intent crimes. "The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime. [Citations.] If the crime charged requires general criminal intent, then the defense should apply to acts committed 'through misfortune or by accident, when it appears there was no . . . [general intent] . . . ,' [citation], regardless of whether the defendant was criminally negligent." (*People v. Lara, supra*, 44 Cal.App.4th at p. 110.) Because both theories were argued to the jury, it was impossible to determine which theory formed the basis for the jury's verdict, and the court therefore reversed, concluding the misinstruction was not harmless beyond a reasonable doubt. (*Id.* at pp. 110-111.)

Here, too, defendant was charged with assault, a general intent crime. (See *People v. Williams* (2001) 26 Cal.4th 779, 788, 790.) And, as the parties recognize, CALJIC No. 4.45 should have been modified to delete the reference to "criminal negligence." But the facts of this case compel a different end result. A criminal negligence theory of liability was never advanced in this case, nor was the jury instructed on this theory. Instead, trial focused on whether defendant intentionally drove his car into the victim. Unlike *People v. Lara, supra,* there is no basis here to think the jury might have rejected an accident defense because it believed defendant to have been criminally negligent. As our earlier discussion makes clear, it was undoubtedly the overwhelming evidence of intent that prompted the jury to reject defendant's claim of accident. Under these circumstances, the instructional error was harmless beyond a reasonable doubt. (See *Williams, supra,* 26 Cal.4th at p. 790.)

B. Lesser Included Offense

Defendant contends the court erred in failing to instruct sua sponte on the lesser included offense of simple assault. No such instruction was required.

A trial court has an obligation to instruct sua sponte on lesser included offenses "'when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.'" (*People v. Breverman*

(1998) 19 Cal.4th 142, 154.) In other words, if the evidence establishes that defendant, if guilty at all, is guilty of the greater offense, a court does not have to instruct on the lesser crime. (*People v. Lema* (1987) 188 Cal.App.3d 1541, 1544-1545.)

Defendant contends that an instruction on simple assault was required in this case because "it is entirely possible that the jury could have found that [he] did not use his car as a deadly weapon in a manner likely to cause death or great bodily injury." Asserting that a car might be operated in a manner likely to cause "only minor injuries, if any," he argues that the victim was not hit "with force likely to produce great bodily injury," and, because defendant had three prior back surgeries, defendant "had no measurable injury that could be attributed to the collision, other than general soreness."

The record belies this wishful thinking. The victim testified that the collision knocked him unconscious. He was taken from the parking lot by ambulance and hospitalized for six to seven days. The impact caused numbness in his legs as well as neck and caused lower back problems. He has chronic pain as a direct result of this collision. The victim acknowledged having had three spinal surgeries at some unspecified time before this incident, but he unambiguously described the injuries and hospitalization caused by defendant's action.

Given this evidence, the court had no duty to instruct on simple assault. If defendant was guilty of any offense, he was guilty of assault with a deadly weapon, i.e., his car, by means

of force likely to cause great bodily injury. There was no error.

VI

Ineffective Assistance of Counsel

Defendant raises a litany of complaints about his trial attorney as evidence that he did not receive the effective assistance of counsel. Defendant's claim is meritless.

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citation.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1126.) "If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.'" (*People v. Mayfield, supra*, 14 Cal.4th at p. 784.)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance' [citations], and we accord great deference to counsel's tactical decisions." (*People v. Frye* (1998) 18 Cal.4th 894, 979.) Accordingly, an attorney is not required to make futile or frivolous motions. (*People v. Memro* (1995) 11 Cal.4th 786, 834.)

Several of defendant's claims of ineffective assistance of counsel have been addressed in our previous discussion. As none of these underlying claims has merit, the failure to raise these matters in trial cannot constitute ineffective assistance of counsel.

The remaining complaints evidence only a difference in preferred trial tactics. For example, defendant now criticizes his attorney's method of cross-examining Hazelheur, especially in bringing out evidence relating to an encounter in the courthouse that demonstrated defendant's anger. But defense counsel made a tactical decision to question Hazelheur about this encounter in order to demonstrate through other witnesses that the event did not occur as described and that Hazelheur was not a credible witness.

In any event, even if we accepted defendant's claims for purposes of argument, defendant cannot demonstrate prejudice. Given the overwhelming evidence, previously outlined, it is not reasonably probable that, but for counsel's alleged shortcomings, a determination more favorable to defendant would have resulted.

VII

Effect of Cumulative Error

Defendant contends the cumulative effect of the asserted errors compels reversal. As we have rejected defendant's claims of error, this contention necessarily fails. (*People v. Mayfield, supra*, 14 Cal.4th at p. 790.)

DISPOSITION

The judgment is affirmed.

HULL, Acting P.J.

We concur:

ROBIE, J.

BUTZ, J.